

Exhibit 5

HIGHLY CONFIDENTIAL - ATTORNEYS EYES ONLY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

--oOo--

WAYMO LLC,

Plaintiff,

Case

vs.

No. 3:17-cv-00939-WHA

UBER TECHNOLOGIES, INC.;

OTTOMOTTO LLC; OTTO TRUCKING LLC,

Defendants.

_____/

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

VIDEOTAPED DEPOSITION OF JUSTIN SUHR

FRIDAY, OCTOBER 13, 2017

Reported by:

Anrae Wimberley

CSR No. 7778

Job No. 2728155

Pages 1 - 350

Page 1

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Transcript of video-recorded deposition
of JUSTIN SUHR, taken at Quinn Emanuel Urquhart &
Sullivan, LLP, 50 California Street, 22nd Floor,
San Francisco, California 94111, beginning at 9:31
a.m. and ending at 6:40 p.m. on Friday, October 13,
2017, before Anrae Wimberley, Certified Shorthand
Reporter No. 7778.

1 transaction and that, again, it was important that 09:40:54
2 we took steps to prevent the likelihood of any
3 even -- inadvertent disclosure of third-party
4 material to us.

5 Q. Did the results of the due diligence 09:41:08
6 investigation affect Uber's decision to acquire
7 Ottomotto?

8 MR. GONZALEZ: Object to form.

9 THE WITNESS: I'm not sure when you say "Uber,"
10 is there a specific person that you have in mind? 09:41:25

11 BY MS. BAILY:

12 Q. Well, you're here testifying as Uber's
13 corporate representative so I'm talking about Uber.

14 MR. GONZALEZ: Still vague. Object to form.

15 THE WITNESS: Yeah, so maybe you can help me 09:41:40

16 with the question because as I understand it, there
17 were several decision makers at Uber. And as I
18 mentioned, the diligence process was essentially to
19 bring -- to allow the company to have comfort that

20 there was this robust process that would prevent the 09:42:03
21 likelihood of the transfer of any third-party
22 material to Uber.

23 BY MS. BAILY:

24 Q. Who were the decision makers at Uber with
25 respect to the decision to acquire Ottomotto? 09:42:19

1 A. I don't have the full list. 09:42:24

2 Q. Who can you name sitting here today?

3 A. Travis Kalanick. I believe board members.

4 Beyond that, I would be speculating.

5 Q. What effect did the results of the due 09:42:48

6 diligence investigation have on Travis Kalanick's

7 decision to acquire Ottomotto?

8 MR. GONZALEZ: Object to form.

9 THE WITNESS: I would be speculating and to

10 some extent it might cause me to waive 09:43:03

11 attorney-client privileged communications.

12 BY MS. BAILY:

13 Q. What effect did the results of the due

14 diligence investigation have on the Uber board

15 members' decision to acquire Ottomotto? 09:43:16

16 MR. GONZALEZ: Object to form.

17 THE WITNESS: Same answer.

18 BY MS. BAILY:

19 Q. Is there anything non-privileged that you

20 can tell me here today regarding the effect of the 09:43:27

21 results of the due diligence investigation on Uber's

22 decision to acquire Ottomotto?

23 MR. GONZALEZ: Other than what he's already

24 testified.

25 THE WITNESS: Yeah, other than what I've 09:43:41

1 testified. 09:43:42

2 BY MS. BAILY:

3 Q. There's no further non-privileged

4 information that you can provide, other than what

5 you've already testified, regarding the effect of 09:43:48

6 the results of the due diligence investigation on

7 Uber's decision to acquire Ottomotto?

8 A. I don't believe so. I don't know if this

9 question is any different than the first -- the

10 earlier one that you asked. 09:43:58

11 Q. What did you say to Mr. Poetzscher in the

12 discussion you had to prepare for your testimony

13 here today?

14 A. I asked him what he believed the effect of

15 the diligence process had on the transaction. 09:44:14

16 Q. Anything else?

17 A. Not really, no.

18 Q. How long was that conversation?

19 A. Approximately six or seven minutes.

20 Q. Did you speak with Salle Yoo to prepare 09:44:35

21 for your deposition today?

22 A. I did not.

23 Q. Did you speak with Angela Padilla to

24 prepare for your deposition today?

25 A. I did not. 09:44:44

1 Again, there was the memo. I believe 11:22:27
2 there may have been other documents, but those more
3 than likely would have been in conjunction with
4 communications that I or others in our legal or
5 business team had with Morrison & Foerster. 11:22:41

6 MS. BAILY: So are you going to take the
7 position that Uber's knowledge about the due
8 diligence investigation and the results, the interim
9 results of that investigation as of April 11, 2016,
10 is privileged because they may have received those 11:22:56
11 results through MoFo from Stroz?

12 MR. GONZALEZ: Communications with legal
13 counsel are absolutely privileged and that will
14 continue to be our position.

15 MS. BAILY: I just want to make sure the record 11:23:14
16 is clear because I didn't ask about the
17 communications.

18 So my question is whether Uber is going to
19 take the position that Uber's factual knowledge
20 about the results being reported on an interim basis 11:23:25
21 by Stroz through April 11, 2016 are, in part,
22 privileged?

23 MR. GONZALEZ: The answer is yes. I'm just not
24 sure that you're accurately characterizing what
25 happened. It's not as though Stroz gave MoFo a 11:23:48

1 piece of paper and MoFo sent the piece of paper to 11:23:51
2 Uber and now MoFo is saying that that piece of paper
3 is privileged. I don't think that's --
4 MS. BAILY: But I'm asking about factual
5 information -- 11:24:02
6 MR. GONZALEZ: Yeah.
7 MS. BAILY: -- from Stroz about the due
8 diligence report.
9 Is it your position that if Stroz provided
10 information to MoFo regarding Anthony Levandowski 11:24:08
11 before April 11, 2016 and Uber got that information
12 from MoFo, that the fact that Uber had that factual
13 information about Mr. Levandowski as of April 11,
14 2016 is privileged?
15 MR. GONZALEZ: So the communications with 11:24:26
16 Morrison & Foerster are privileged. That's our
17 position.
18 MS. BAILY: So that's not my question. The
19 fact of Uber's knowledge regarding Anthony
20 Levandowski -- 11:24:36
21 MR. GONZALEZ: Well, you're assuming a fact.
22 You're assuming a fact. You're -- you're getting
23 into the communication and trying to pull something
24 out of it.
25 MS. BAILY: I'm trying to establish what Uber 11:24:45

1 knew regarding the diligence investigation as of 11:24:47
2 April 11, 2016.

3 MR. GONZALEZ: Understood completely.

4 MS. BAILY: The facts, regardless of where they
5 were obtained. 11:24:57

6 MR. GONZALEZ: I disagree with you.

7 MS. BAILY: Are the facts related to the due
8 diligence agreement that were known by Uber as of
9 April 11, 2016 privileged?

10 MR. GONZALEZ: If there's a fact that was known 11:25:03
11 to them only because of the communication with legal
12 counsel, absolutely. Absolutely.

13 BY MS. BAILY:

14 Q. Setting aside the attestations that you
15 testified about, did Uber have any interim reports 11:25:19
16 regarding the due diligence investigation as it
17 related to Lior Ron prior to April 11, 2016?

18 A. I don't recall if it was prior to
19 April 11th, but I know that we had received interim
20 reports about Lior Ron. 11:25:39

21 Q. You don't recall whether any of them were
22 prior to April 11, 2016?

23 A. I don't, no.

24 Q. What was the form of those interim
25 reports? 11:25:49

1 MR. GONZALEZ: Object to form. 13:35:31

2 THE WITNESS: I don't -- I don't know if that's

3 the case.

4 BY MS. BAILY:

5 Q. Well, it says right here that, "Stroz 13:35:36

6 performed a forensic analysis of the last access

7 dates of the files in your personal DropBox account

8 that you identified as being Aspen documents during

9 your interview process with Stroz."

10 Do you see that? 13:35:49

11 A. I do.

12 Q. Is Aspen a code word for Google?

13 A. Yes.

14 Q. So Mr. Levandowski did not certify that he

15 did not access the files listed here; right? 13:36:01

16 A. Right.

17 Q. He left open the possibility that he

18 personally accessed the Google files listed here, he

19 just couldn't remember; right?

20 A. I don't know if he's leaving open a 13:36:16

21 possibility. What he states here is that he doesn't

22 recall whether he initiated access.

23 Q. Did that seem credible to you when you

24 reviewed this before April 11, 2016?

25 MR. GONZALEZ: Instruct you not to answer. 13:36:29

1 Attorney-client, mental impression of a lawyer, work 13:36:30
2 product.
3 BY MS. BAILY:
4 Q. Did you discuss the credibility of the
5 certification with anyone? 13:36:37
6 MR. GONZALEZ: I object -- well, you can answer
7 that yes or no.
8 THE WITNESS: Yes.
9 BY MS. BAILY:
10 Q. Who? 13:36:41
11 MR. GONZALEZ: I would instruct you not to
12 answer.
13 MS. BAILY: The identity of the individuals
14 with whom he communicated?
15 MR. GONZALEZ: Correct. 13:36:48
16 MS. BAILY: Is privileged?
17 MR. GONZALEZ: Yes.
18 MS. BAILY: It would appear on a privilege log.
19 MR. GONZALEZ: Not if you have an oral
20 conversation. 13:36:56
21 MS. BAILY: Sure it would.
22 MR. GONZALEZ: Don't think so.
23 MS. BAILY: So just for the record, the
24 identity of individuals that participated in a
25 conversation regarding the credibility of 13:37:09

1 Mr. Levandowski's certification, there's a privilege 13:37:12
2 claim with respect to that; is that right? Just for
3 the record.

4 MR. GONZALEZ: I think the record is pretty
5 clear. 13:37:22

6 MS. BAILY: But is that correct? I just want
7 to make sure I understand.

8 MR. GONZALEZ: The record is correct.

9 BY MS. BAILY:

10 Q. Did Mr. Levandowski's inability to state 13:37:28
11 clearly that he had not accessed Google proprietary
12 information after he left Google raise any concerns
13 at Uber?

14 MR. GONZALEZ: Instruct you not to answer,
15 attorney-client work product. 13:37:41

16 BY MS. BAILY:

17 Q. Did Uber expand the scope of the due
18 diligence investigation in light of
19 Mr. Levandowski's inability to say one way or
20 another whether he had been accessing Google 13:37:52
21 confidential information after he left Google?

22 A. Is this post April 11th?

23 Q. Let's take pre-April 11th first. Once
24 Uber received this attestation, did it expand the
25 scope of the due diligence investigation in light of 13:38:12

Page 152

1 robust? 15:31:26

2 MR. GONZALEZ: That question assumes a fact.

3 And also object to form.

4 THE WITNESS: I still feel like this is calling

5 for attorney work product. Maybe we can hash this 15:31:43

6 out at a break. I just -- again, I'm really just

7 trying to be precise and not inadvertently waive.

8 That's my --

9 BY MS. BAILY:

10 Q. So for now, you have no non-privileged 15:31:55

11 information to provide in response to that question

12 and you'll talk to your lawyer at a break?

13 A. I believe what you're asking for is my

14 work product opinion on the quality of the diligence

15 construct that was set up. 15:32:11

16 Q. And just to be clear for the record, my

17 position is that you've already testified as to that

18 and I'm entitled to explore that further. So maybe

19 you guys can talk about that at the break.

20 A. Well, and I'll just say that the context 15:32:25

21 of that response was in the context -- a description

22 of the effect and the purpose, rather than my

23 opinion about the actual process itself.

24 Q. The context of what response?

25 A. The use of the word robust was used to 15:32:41

1 describe what -- sort of the reasons behind the 15:32:44
2 origin to the affect of the Stroz process, not my
3 personal or professional opinion of its quality.

4 Q. I don't think that I understand that
5 distinction to be a meaningful one, but you guys can 15:32:58
6 revisit it at a break and decide how you want to
7 deal with that question and we can fight over it if
8 we need to later.

9 The next whereas clause says, "The Parties
10 have agreed that the Outside Expert will continue to 15:33:13
11 analyze the devices, materials and information
12 provided by each Diligenced Employee solely for the
13 purpose of completing a final report."

14 Is that a reference to what we've already
15 discussed today as the ongoing investigation by 15:33:27
16 Stroz related to the due diligence protocols?

17 A. Yes.

18 Q. And then it says, "The Outside Expert may
19 give interim reports to its Clients (with the
20 participation of the Completed Diligenced Employees' 15:33:41
21 counsel) regarding any matters which the Outside
22 Expert believes may be subject to or included in the
23 final report."

24 My question is: Did Uber ever receive any
25 interim reports from Stroz between April 11, 2016 15:33:55

1 and the issuance of the final report on August 5th, 15:34:00
2 2016?

3 A. Yes.

4 Q. What were those interim reports?

5 A. Are you asking for the content of those 15:34:11
6 reports?

7 Q. Yes, if they're not privileged.

8 A. So the entirety of any interim report that
9 I would have received would have been through
10 Morrison & Foerster in the context of legal advice. 15:34:21

11 MR. GONZALEZ: You need to clarify. Because
12 she had asked you about receiving reports from
13 Stroz, which is why I didn't object, and you said
14 yes.

15 THE WITNESS: That's my mistake then. 15:34:31

16 So any interim report that I would have
17 received would not have been directly from Stroz.
18 It would have been from Morrison & Foerster in the
19 context of legal advice.

20 BY MS. BAILY: 15:34:46

21 Q. You received the April 2, 2016 Levandowski
22 interview memorandum from Morrison & Foerster;
23 correct?

24 A. I believe so, yes.

25 Q. And you testified at length about that 15:34:57

1 memorandum here today; right? 15:35:00

2 A. I testified at length about what's
3 contained in that memorandum, not the advice that I
4 got concerning the contents of that memorandum.

5 Q. And I'm not asking for any advice that you 15:35:09
6 got from your counsel about anything.

7 MR. GONZALEZ: You testified about a document
8 that's been produced in the litigation. That's the
9 distinction.

10 MS. BAILY: Again, I think we're going to have 15:35:23
11 a dispute about that being a distinction.

12 BY MS. BAILY:

13 Q. I guess I just want to establish for the
14 record, is there anything non-privileged that you
15 can tell me about interim reporting related to the 15:35:35
16 due diligence between April 11, 2016 and the
17 issuance of the final report?

18 A. I don't believe so. I think the entirety
19 of any information that I received about the due
20 diligence after April 11th would have been through 15:35:53
21 Morrison & Foerster.

22 Q. Did Uber learn any new facts regarding the
23 due diligence that it did not have prior to
24 April 11, 2016 -- between April 11, 2016 and the
25 issuance of the final report? 15:36:11

1 MR. GONZALEZ: So I would instruct you not to 15:36:13
2 include in your answer any information that may have
3 been communicated to you by legal counsel. If you
4 received new facts in a non-privileged context, you
5 can share that with counsel. 15:36:22

6 THE WITNESS: There wouldn't be any information
7 shared with me outside of external counsel.

8 BY MS. BAILY:

9 Q. When the indemnification was signed
10 on -- strike that. 15:36:50

11 As of April 11, 2016 when the
12 indemnification agreement was signed, through the
13 due diligence process, Uber was already aware of
14 some acts that would fall within the indemnification
15 agreement; is that right? 15:37:08

16 MR. GONZALEZ: I'm going to instruct him not to
17 answer that question because that calls for a legal
18 opinion as to what might fall within the
19 indemnification agreement. It's work product and
20 attorney-client. 15:37:23

21 BY MS. BAILY:

22 Q. Because the due diligence investigation
23 had not been completed as of April 11, 2016, Uber
24 was agreeing to indemnify the diligenced employees
25 for bad acts that Uber was potentially not aware of 15:37:37

1 self-identified devices or repositories, that it 15:41:44
2 would then be obligated to indemnify them for those
3 claims -- I think they're set out in a paragraph in
4 here, right -- subject to some exceptions that are
5 set forth in this agreement. 15:42:03

6 Q. And as of the time the indemnification
7 agreement was signed, the data contained in the
8 various self-identified devices and repositories had
9 not yet been fully evaluated by Stroz; right?

10 A. The data contained in the repositories had 15:42:23
11 not been fully evaluated, but there were lengthy
12 interviews and there were last access reports and
13 there were devices collected and the review had
14 begun.

15 Q. And just to be clear, the interviews with 15:42:42
16 the diligenced employees were conducted before any
17 analysis was done on their devices; right?

18 A. Yes.

19 Q. Did the Uber board have to approve the
20 acquisition agreement with Ottomotto? 15:42:57

21 A. I believe so.

22 Q. Prior to April 11, 2016 when the
23 acquisition agreement was signed, what was the Uber
24 board told about the Stroz due diligence
25 investigation? 15:43:14

Page 230